

APPEAL NO. 051359
FILED AUGUST 3, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 28, 2005. The hearing officer resolved the disputed issue by deciding that the respondent (claimant) is entitled to supplemental income benefits (SIBs) for the eighth quarter, January 8 through April 8, 2005. The appellant (carrier) appealed, arguing that the hearing officer failed to properly consider evidence of an "other record" showing that the claimant had some ability to work; that the hearing officer improperly balanced the conflicting records showing some ability to work; and that the hearing officer failed to properly evaluate the treating doctor's report purporting to specifically show a total inability to work. The appeal file does not contain a response from the claimant.

DECISION

Reversed and rendered.

The parties stipulated in part that the claimant sustained a compensable injury on _____, that the claimant reached maximum medical improvement with an impairment rating of 15% or greater; that the claimant did not elect to commute any portion of impairment income benefits; and that the eighth quarter qualifying period began on September 26 and ended December 25, 2004. We note that stipulation 1.h. contains a typographical error regarding the starting date of the qualifying period and we reform that stipulation to reflect the agreement of the parties and the evidence that the eighth quarter qualifying period began on September 26, 2004, rather than September 26, 1994, as reflected in the decision and order.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The SIBs criterion in issue is whether the claimant made a good faith effort to obtain employment commensurate with his ability to work during the qualifying period for the eighth quarter. The claimant contends that he has a total inability to work. Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

The hearing officer found that the "[c]laimant presented a narrative report from his treating doctor, . . . which indicated claimant was unable to return to work in any capacity and which specifically explains how the injury caused claimant a total inability to work during the eighth quarter qualifying period." While that may arguably be the case, it is on the basis of the other record criteria set forth in Rule 130.102(d)(4) that we reverse this case. In evidence was a medical report from (Dr. K), who performed a

required medical examination of the claimant. Dr. K, noted that based on his evaluation, he did not find an objective medical reason which would preclude the claimant from returning to work in some capacity. Dr. K also referred to a functional capacity evaluation (FCE) of the claimant dated December 20, 2004, which demonstrated that the claimant had the ability to safely work within the sedentary work category. The hearing officer mentioned the December 20, 2004, FCE in her discussion of the evidence pointing out that the evaluator of the FCE noted that the claimant's efforts were inconsistent and unreliable. The hearing officer discussed the medical records from the Texas Workers' Compensation Commission-selected designated doctor explaining that his opinion that the claimant is capable of returning to work with restrictions conflicted with the Work Status Report (TWCC-73) submitted by him and the results of the FCEs performed on April 1, 2005, and December 20, 2004. However, the hearing officer failed to indicate why Dr. K's report was not credible or an other record which showed that the claimant is able to return to work in at least some kind of limited or sedentary duty capacity. In cases where a total inability to work is asserted and there are other records which on their face appear to show an ability to work, the hearing officer is not at liberty to simply reject those records as not credible without explanation or support in the record. Texas Workers' Compensation Commission Appeal No. 002498, decided November 30, 2000. We would note that the hearing officer does have some discretion in making this fact determination. "The mere existence of a medical report stating the claimant had an ability to work alone does not mandate that a hearing officer find that other records showed an ability to work. The hearing officer still may look at the evidence and determine that it failed to show this." Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000.

We hold that the claimant did not meet the requirements of Rule 130.102(d)(4) in that there was an other record which showed that the claimant was able to return to work. Therefore, we reverse the hearing officer's finding that because the claimant had a total inability to work during the eighth quarter qualifying period, the criterion that the claimant attempt in good faith to obtain employment commensurate with his work ability is satisfied. We reverse the hearing officer's decision that the claimant is entitled to SIBs for the eighth quarter and render a new decision that the claimant is not entitled to SIBs for the eighth quarter.

The true corporate name of the insurance carrier is **LIBERTY MUTUAL FIRE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEMS
350 NORTH ST. PAUL, SUITE 2900
DALLAS, TEXAS 75201.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge